

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES C. HILL,)
)
Plaintiff,)
v.) C.A. No. 05-cv-00452-JJF
)
SUPER FRESH FOOD MARKETS, INC.,)
)
Defendant.)

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT**

Defendant, Super Fresh Food Market, Inc. (incorrectly referred to in the Complaint as "Super Fresh Food Markets, Inc." and hereinafter "Super Fresh"), hereby submits this Memorandum of Law in Opposition to Plaintiff's Motion for Default Judgment.

STATEMENT OF PROCEDURAL HISTORY AND RELEVANT FACTS

1. On June 30, 2005, Plaintiff filed a *pro se* Complaint in the above-captioned matter in the United States District Court for the District of Delaware, Civil Action No. 05-452 (JJF). (D.I. 2).
2. On November 9, 2005, the Complaint was served on Super Fresh.
3. On November 29, 2005, Super Fresh filed a motion seeking an extension of time to answer, respond, or otherwise plead to Plaintiff's Complaint. (D.I. 12).
4. On December 1, 2005, the Court granted Super Fresh's motion, which gave Super Fresh until December 13, 2005, to answer, respond, or otherwise plead to Plaintiff's Complaint. (D.I. 14).

5. On December 12, 2005, Super Fresh filed a motion to dismiss the Complaint and accompanying memorandum of law. (D.I. 16-17). A copy of the motion was served on Plaintiff on the same day. (D.I. 16).

6. On January 6, 2006, Plaintiff filed a Motion for Default Judgment. (D.I. 18).

7. By letter dated January 9, 2006, Super Fresh requested that Plaintiff withdraw his motion. See Letter, attached as Exhibit 1.

ARGUMENT

8. Judgment by default is appropriate when the party against whom the judgment is sought "has failed to plead or otherwise defend" against the complaint as provided by the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 55(a); Palmer v. Slaughter, C.A. No. 99-899-GMS, 2000 U.S. Dist. LEXIS 22118, at *5 (D. Del. July 13, 2000).

9. Pursuant to Fed. R. Civ. P. 12(a)(1)(A), a party has 20 days to respond to a Complaint. Here, Super Fresh's 20-day time period to respond to the Complaint was extended to December 13, 2005, pursuant to the Court's December 1, 2005, Order. (D.I. 4). As Super Fresh filed a Motion to Dismiss the Complaint in lieu of filing an Answer (D.I. 16) within the time period provided by the Court's December 1, 2005, Order (D.I. 4)), Super Fresh is not in default and Plaintiff's application should be dismissed. Fed. R. Civ. P. 55(a); Palmer, 2000 U.S. Dist. LEXIS 22118.

10. Further, while Super Fresh recognizes that Plaintiff is proceeding *pro se*, that does not alleviate his obligation to comply with, among other things, the Federal Rules of Civil Procedure. See Wilson v. Pinkerton, Inc., C.A. No. 99-896-JJF, 2004 U.S. Dist. LEXIS 4929, *at 6 (D. Del. March 23, 2004). See also Downs v.

Westphal, 78 F.3d 1252, 1257 (7th Cir. 1996) (holding that being a *pro se* litigant does not give one "the discretion to choose which of the court's rules . . . [one] will follow"). By filing the Motion for Default, Plaintiff has advanced arguments that have no legal basis, which is in violation of Fed. R. Civ. P. 11(b)(2). It is respectfully submitted that Plaintiff should be admonished for bringing this motion and refusing to immediately withdraw it upon notice of its frivolity. See Ex. 1.

CONCLUSION

For the foregoing reasons, Super Fresh respectfully requests that the Court dismiss Plaintiff's Motion for Default Judgment.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Margaret M. DiBianca

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Attorneys for Defendant Super Fresh Markets, Inc.

DATED: January 17, 2006

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FOR THE DISTRICT OF DELAWARE

JAMES C. HILL,)	
)	
Plaintiff,)	
v.)	C.A. No. 05-cv-00452-JJF
)	
SUPER FRESH FOOD MARKETS, INC.,)	
)	
Defendant.)	

ORDER

Upon consideration of Plaintiff James C. Hill's Motion for Default Judgment and Defendant Super Fresh Food Markets, Inc.'s Memorandum of Law in Opposition to Plaintiff's Motion for Default Judgment, it is by the Court this ____ day of _____, 2006:

ORDERED that Plaintiff's Motion is hereby **DENIED**.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES C. HILL,)
)
Plaintiff,)
v.) C.A. No. 05-cv-00452-JJF
)
SUPER FRESH FOOD MARKETS, INC.,)
)
Defendant.)

CERTIFICATE OF SERVICE

I, Margaret M. DiBianca, hereby certify that on January 17, 2006, I electronically filed a true and correct copy of the foregoing **Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Default Judgment** with the Clerk of the Court using CM/ECF. I further certify that on January 17, 2006, I served two (2) true and correct copies of **Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Default Judgment** on the following non-registered participant via postage prepaid, U.S. Mail and First Class Certified U.S. Mail/Return Receipt Requested:

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DATED: January 17, 2006